

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN RE: CAPITAL ONE CONSUMER)
DATA SECURITY BREACH LITIGATION)
_____)

MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to ALL Cases

**APPLICATION FOR APPOINTMENT OF PLAINTIFFS' LEAD COUNSEL
OR STEERING COMMITTEE**

Pursuant to Paragraph 3(a) of Pretrial Order #1, Whitfield Bryson & Mason LLP ("WBM") (led by Martha A. Geer and assisted by Gary E. Mason) make this application for appointment as Plaintiffs' Lead Counsel or to the Plaintiffs' Steering Committee. WBM also supports the appointment of Charles E. Schaffer of Levin Sedran & Berman ("LSB") to the Plaintiffs' Steering Committee.

OVERALL QUALIFICATIONS AND EXPERIENCE

A. Professional Experience in this Type of Litigation.

WBM is dedicated to representing plaintiffs in class actions, mass torts, and individual cases in courts throughout the United States. Founded in January 2012, the firm was created by a merger of three firms each of which had been representing plaintiffs for decades. The firm has offices in Washington, District of Columbia; Raleigh, North Carolina; Nashville, Tennessee; and Madisonville, Kentucky, and WBM attorneys have extensive experience litigating in this Court and the Fourth Circuit.

WBM's attorneys have frequently served as lead counsel or co-lead counsel or performed other leadership roles in class actions of national significance. For example, WBM currently serves as

Co-Lead Counsel in the *Hill's Pet Food* MDL,¹ Co-lead Counsel in the *Lumber Liquidators Durability* MDL,² Co-Lead Counsel in the *Pella Windows & Doors* MDL³ and, in the *Chinese Drywall* MDL,⁴ served as Co-Chair of the Science and Expert Committee, Co-Chair of the Insurance Committee, and a member of the trial team for the bell-weather trials. WBM has significant experience in data breach cases, and currently serves as Liaison Counsel in the Office of Personal Management (OPM) data breach litigation,⁵ currently represents 14 bell-weather plaintiffs in the Marriott data breach litigation,⁶ and previously served as Co-Lead counsel in *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, MDL No. 1796, No. 1:06-mc-00506 (D.D.C. filed Nov. 14, 2006), *appeal dismissed*, No. 09-05405 (D.C. Cir. Dec. 14, 2009) and *In re Google Buzz Privacy Litig.*, No. 10-cv-00672-JW (N.D. Cal. May 31, 2011). A copy of WBM's firm resume is attached as Exhibit A.

Martha A. Geer has a combination of experience that few attorneys possess—experience that is uniquely valuable both to clients and courts. She has practiced for more than two decades as a respected litigator and appellate advocate and served for more than 13 years on the North Carolina Court of Appeals as a rarely-reversed appellate judge. She has wide experience both as a litigator and as a judge with complex civil litigation, including the areas of class actions, consumer protection, securities, employment, civil rights, and business litigation. Her judicial experience will help her have a better perspective regarding what the Court most needs while her

¹ *In re Hill's Pet Nutrition, Inc. Dog Food Prods. Liab. Litig.*, MDL No. 2887, No. 2:19-md-02887 (D. Kan. filed June 6, 2019).

² *In re Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Practice Litig.*, MDL No. 2743, No. 1:16-md-02743 (E.D. Va. filed Oct. 4, 2016), *appeal filed*, No. 19-1231 (Mar. 1, 2019).

³ *In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods Liab. Litig.*, MDL No. 2514, No. 1:14-mn-00001 (D.S.C. Mar. 7, 2018).

⁴ *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, No. 2:09-md-02047 (E.D. La. filed June 15, 2009).

⁵ *In re U.S. Office of Personnel Mgmt. Data Security Breach Litig.*, MDL No. 2664, No. 1:15-mc-01394 (D.D.C. Sept. 20, 2017), *rev'd in part, aff'd in part*, No. 17-5217 (D.C. Cir. June 21, 2019).

⁶ *In re Marriott Int'l Inc., Customer Data Sec. Breach Litig.*, MDL No. 2879, No. 19-md-2879 (D. Md. filed Feb. 6, 2019).

litigation experience will allow her to ensure that the plaintiff classes receive superior representation, including being best positioned for any appeals that may occur.

Prior to going on the bench in 2003, Ms. Geer was recognized in the *Best Lawyers in America* and as one of the top North Carolina lawyers by *Business North Carolina*. During her tenure on the North Carolina Court of Appeals, Ms. Geer heard more than 3,800 appeals, authored more than 1,350 opinions, and had her opinions reversed less than 2% of the time. She left the Court to become a partner at Cohen Milstein Sellers & Toll LLP, a leading plaintiffs' class action firm, and founded its North Carolina office. She subsequently joined Whitfield Bryson & Mason LLP. Since returning to private practice, she has been included in *The Best Lawyers in America* (2018, 2019, & 2020 eds.) in the areas of mass tort/class actions and appellate practice. She is a board-certified Appellate Specialist in North Carolina. A copy of Ms. Geer's resume is attached as Exhibit B.

Gary E. Mason is a Founding Partner and Chairman of WBM and manages the firm's Washington, D.C. office. Mr. Mason was previously a Partner at Cohen Milstein Sellers & Toll LLP, where he was the first Co-Chair of its Consumer Protection Practice Group. Mr. Mason is a nationally recognized leader of the class action bar. He was the 2012-2013 Co-Chair of the Class Action Litigation group for the American Association for Justice. He has repeatedly been named a Washington, D.C. Super Lawyer for Class Actions.

Mr. Mason has served as Lead, Co-Lead Counsel or Liaison Counsel in three major data breach cases (*OPM*, *VA Laptops*, and *Google Buzz*) and over the course of his 30-year career has successfully taken the lead on hundreds of other class actions. Mr. Mason was a Co-Chair of the HarrisMartin Equifax Data Breach Litigation Conference in Atlanta, Georgia and presented on standing issues in data breach cases. He was also a panelist at the HarrisMartin Marriott Data

Breach Litigation Conference in Miami, Florida, where he addressed issues arising from Chinese espionage. He also recently spoke on issues in privacy litigation at the 2019 Mass Torts Made Perfect Conference in Las Vegas, Nevada. A copy of Mr. Mason's resume is attached as Exhibit C.

B. Willingness and Availability to Commit to a Time-Consuming Project

Both Ms. Geer and Mr. Mason are willing and able to commit whatever time it takes to work on this MDL. They intend to draw on the deep resources of their firm, including its 15 attorneys and 15 paralegals. WBM has extensive experience handling complex litigation of this nature and is prepared to handle all work required up to and including trial *and* appeals. There would be no issue in complying with the duties of Lead Counsel outlined in the Court's Initial Order before the Initial Status Conference and Rule 16(b) Conference on January 21, 2020.

C. Ability to Work Cooperatively with Others

WBM attorneys, including Ms. Geer and Mr. Mason, have for decades worked cooperatively with attorneys in numerous class actions and MDLs, most of those applying for leadership in this MDL. For Ms. Geer, in order to be able to serve effectively as an intermediate appellate court judge, she had to be able to work cooperatively with all the members of her court. Indeed, all the attorneys at WBM welcome the opportunity to partner with other firms in order to ensure the best quality representation is provided to plaintiffs. In addition, in cases such as this one, WBM understands that it is absolutely critical to properly coordinate and manage numerous attorneys to successfully perform the necessary discovery required in what is often a short amount of time.

D. Willingness to Commit the Necessary Resources to Pursue this Matter at an Expeditious Pace.

WBM is adequately capitalized to pay for all necessary assessments and is well aware that this type of litigation is expensive to pursue especially at an expeditious pace. The firm has always paid all assessments in every MDL that it has been involved with. The firm is willing to provide an *in camera* review of appropriate financial information upon request. There are no financing arrangements in place that would require disclosure. Further, because WBM has filed a complaint with plaintiffs from all 50-states and the District of Columbia, it is prepared to move quickly into the “bell-weather” phase of these proceedings.

E. Any Compensation Arrangement that Counsel is Willing to Accept

WBM will seek benefits for the class including: 1) credit monitoring and identity theft insurance; 2) a cash fund to reimburse out-of-pocket losses and compensate time spent responding to the breach; and 3) injunctive relief via enhanced data security. These benefits are consistent with prior large data breach class action settlements. Credit monitoring for more than one year is particularly important because the risk of identity theft extends for many years after a criminal data breach.

If appointed as Lead Counsel, WBM would agree to the following fee structure:

- 2% of the value of credit monitoring actually distributed to class members; and
- 15% of any cash fund established to compensate class members.

This structure can be used as a baseline for evaluating the fee award, and the Court can exercise its discretion to award a higher or lower fee than the baseline. The Court could consider factors such as, *e.g.*, the existence of any injunctive relief; the stage of the proceedings at which the case was resolved; and any other factors the Court deems relevant.

CONCLUSION

WBM respectfully requests that Martha A. Geer be appointed Co-Lead Counsel and Gary E. Mason and Charles E. Schaeffer of Levin Sedran & Berman be appointed to the Plaintiffs' Steering Committee.

Dated: November 18, 2019

Respectfully submitted,

/s/ Gary E. Mason

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